Office-Supreme Court, U.S.
FILED
DEC 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-593

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ELLSWORTH FREIGHT LINES, INC., et al.,
Appellants.

v.

STATE TAX COMMISSION OF MISSOURI,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MISSOURI

MOTION TO DISMISS OR AFFIRM

JOHN ASHCROFT
Attorney General

WILLIAM F. ARNET
Assistant Attorney General

Broadway State Office Building
221 West High Street, 8th Floor
Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-8814

Attorneys for Appellees

RICHARD L. WIELER
Assistant Attorney General
Of Counsel

December 30, 1983

KELLY PRESS, INC., 201 S. Eighth St., Columbia, Missouri Dial 314/449-4163

TABLE OF CONTENTS

Page

Table of Authorities:

Cases II

Statutes III

Other Authorities III

Motion to Dismiss or Affirm:

The State Statute Involved and
The nature of the Case 2

Argument 8

Conclusion 18

TABLE OF AUTHORITIES

Cases

Dows v. *City of Chicago*, 11 Wall. 108, 20 L.Ed. 65 (1871) 16

Edelman v. *Jordan*, 415 U.S. 651 (1974) 13

Ellsworth Freight Lines v. *Missouri Highway Reciprocity Commission, 35 al.*, 568 S.W.2d 521 (Mo. banc 1978) appeal dismissed, cert. den. 440 U.S. 901 (1979) 3, 4, 7, 8, 9, 16

Evansville-Vanderburgh A. A. Dist. v. *Delta Air Lines, Inc.*, 405 U.S. 717 (1972) 11

First National Bank of Greeley v. *Board of County Commissioners of the County of Weld*, 264 U.S. 450 (1924) 16

Gas Service Company v. *Morris*, 353 S.W.2d 645 (Mo. 1962) 3

Kane v. *New Jersey*, 242 U.S. 160 (1916) 10

Murray v. *Wilson Distilling Company* 213 U.S. 151 (1909) 12

Parden v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964) 12, 13

Petty v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959) 12, 13

State ex rel. Brady Motorfrate, Inc., et al. v. *State Tax Commission*, 517 S.W.2d 133 (Mo. 1974) 3, 8, 15

Steel Haulers, Inc. v. *United States*, 316 F.Supp. 707 (W.D.Mo. 1970), aff'd 440 F.2d 1176 (8th Cir. 1971) 15

Transport Rentals, Inc. v. *Carpenter*, 325 S.W.2d 745 (Mo. 1959) 10

Statutes

§ 136.035, RSMo 1978 .....2, 3, 4, 5, 6, 7, 9, 10, 11, 16
§ 301.090, RSMo 1978 14
§§ 301.271-301.279, RSMo 1978 14

Other Authorities

60 C.J.S., Motor Vehicles, § 61, p. 408 10
Mo. Constitution, Art. IV, § 30 14

No. 83-593

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ELLSWORTH FREIGHT LINES, INC., et al.,
Appellants.

v.

STATE TAX COMMISSION OF MISSOURI,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MISSOURI

MOTION TO DISMISS OR AFFIRM

The appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Missouri on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of § 136.035, RSMo 1978,[1] and the construction placed upon this Missouri statute by the Missouri Supreme Court with respect to the attempted recovery of highway registration taxes collected improperly by the state of Missouri. Section 136.035, RSMo 1978, provides as follows:

> 1. The director of revenue from funds appropriated shall refund any overpayment or erroneous payment of any tax which the state is authorized to collect. The general assembly shall appropriate and set aside funds sufficient for the use of the director of revenue to make refunds authorized by this section or by final judgment of court.
>
> 2. The director of revenue shall refund any overpayment or erroneous payment of any tax on tangible personal property and the amount refunded shall be charged against the next apportionment to the political subdivision which was the residence or situs of the taxpayer at the time the tax was paid.
>
> 3. No refund shall be made by the director of revenue unless a claim for refund has been filed with him within two years from the date of payment. Every claim must be in writing under oath and must state the specific grounds upon which the claim is founded.

---

[1]The controversy herein predates 1978, but the statute as recodified in 1978 remains the same as the version in effect during the controversy and, therefore, all references will be to the 1978 codification.

In addition to the current dispute, appellants have caused the Missouri Supreme Court to construe this statute on a prior occasion. In *Ellsworth Freight Lines* v. *Missouri Highway Reciprocity Commission, et al.*, 568 S.W.2d 521 (Mo. banc 1978), appeal dismissed, cert. den. 440 U.S. 901 (1979), the Missouri Supreme Court determined that a direct action for recovery of highway registration fees initiated in a circuit court in Missouri would not lie and that the appellants must pursue their refunds through the administrative remedies provided by statute. This ruling followed a line of cases in Missouri holding that where the Missouri legislature has provided a procedure for the recovery of taxes illegally collected, this procedure is exclusive and must be followed. See *Gas Service Company* v. *Morris*, 353 S.W.2d 645, 654-655 (Mo. 1962); and *State ex rel. Brady Motorfrate, Inc.* v. *State Tax Commission*, 517 S.W.2d 133, 137-138 (Mo. 1974).

Section 136.035, RSMo 1978, is the exclusive procedure adopted by the Missouri legislature for recovery of highway registration fees collected improperly in this state. It requires the filing of a written claim setting forth the specific grounds upon which the claim is founded, and it limits the right of refund to within two years from the date of filing.

In the present dispute, the appellants utilized the exclusive procedure available under § 136.035, RSMo 1978, but refused to accept the restrictions. Following a successful appeal by the appellants to the Circuit Court of Cole County, Missouri (Appendix A of appellants' jurisdictional statement), the Missouri Supreme Court again reviewed § 136.035, RSMo 1978, and applied it to reverse the circuit court's opinion (Appendix B of appellants' jurisdictional statement). The Missouri Supreme Court again confirmed the statute with its restrictions as the exclusive means of

recovery thereby limiting the named appellants to a two year limitation period from the date of their claims, disallowing any payment of interest under the statute, and denying the propriety of a class action under the statute as written.

B. The Proceedings Below

Subsequent to the dismissal of appeal and denial of certiorari by this court from the decision of the Missouri Supreme Court in *Ellsworth Freight Lines* v. *Missouri Highway Reciprocity Commission, supra,* the appellants pursued the remedies available to them under § 136.035, RSMo 1978, in the state of Missouri. Prior to the filing of the lawsuit to collect directly in the Circuit Court of Cole County, Missouri, three of the appellants, Ellsworth Freight Lines, Inc., Hirschbach Motor Lines, Inc., and Kroblin Refrigerated Xpress, Inc., along with two other trucking firms, Bruce Motor Freight, Inc., and Brady Motorfrate, Inc., had filed a claim for refund with the Director of Revenue in late 1969 for highway registration fees allegedly collected in violation of the Vehicle Registration Proration and Reciprocity Agreement (Uniform Compact) to which the state of Missouri was and is a party. The hearing on the applications for refund was held before the Director of Revenue on July 25, 1970, at which time the two year statute of limitations contained in § 136.035, RSMo 1978, was pointed out. Brady and Bruce appealed the decision of the Director of Revenue against their claim to the State Tax Commission and ultimately to the Missouri Supreme Court, where it was held that the formula used by the Missouri Highway Reciprocity Commission in determining registration fees had been improper, but that the two statutes of limitations contained in § 136.035, was applicable. *State ex rel. Brady Motorfrate, Inc.* v. *State Tax Commission, supra.*

During this period, the Director of Revenue also denied the claims of Ellsworth, Hirschbach and Kroblin. At that time, these appellants filed an application for review of the Director's decision with the Missouri State Tax Commission, the next step for reviewing the Director's decision at that time. No further action was taken, however, until resolution of the dispute directly filed in the Circuit Court of Cole County and resolved contrary to appellants' position by the Missouri Supreme Court.

The entire controversy was placed before the Missouri State Tax Commission for a decision based on a stipulation. After reviewing the stipulation and the attached exhibits, the Missouri State Tax Commission made a decision on December 19, 1978. In that decision, the Commission found that a class action could not be maintained under § 136.035, RSMo 1978, and that the two year statute of limitations set forth therein could not be tolled by the filing of a class action. Furthermore, the Commission found that no facts had been presented to show that the state had induced delay in the filing of any refund, thereby negating any claim by the appellants of estoppel. Recovery was granted to the three named appellants for the two year period preceding their initial claims, but no interest was allowed on that recovery.

A petition for judicial review was timely filed by the appellants to the Cole County Circuit Court. In that petition, the appellants again stated that a claim for refund was unnecessary because of the nature of the violation. On July 7, 1982, the Cole County Circuit Court entered a judgment finding that the Missouri Highway Reciprocity Commission had violated the Uniform Compact by not following the mileage formula therein when computing highway registration fees, and that such violation created an unreasonable burden on interstate commerce, destroyed the

obligations of contract of the appellants, and violated the due process, equal protection and privileges and immunities rights of the appellants. The Circuit Court of Cole County, Missouri, also found that a class action was permissible but, in the alternative, the statute of limitations should be tolled to allow the filing of claims for refund by other trucking companies. Finally, the Circuit Court of Cole County, Missouri, awarded interest of five percent on all monetary claims.

On appeal to the Supreme Court of Missouri, the appellees argued that the circuit court erred in reversing the decision of the Missouri State Tax Commission denying a class action because § 136.035, RSMo 1978, the exclusive means of recovering overpayments of highway registration fees, does not provide for class actions, and further that the filing of the purported class action under this section did not toll the two year statute of limitations. Appellees further argued that the circuit court erred in reversing the decision of the Missouri State Tax Commission concerning interest because interest is not applicable in actions for recovery of taxes collected improperly under § 136.035, RSMo 1978. Contrary to the assertions made by the appellants, the appellees argued that the state of Missouri had not waived any of its statutory rights with respect to the exclusive procedures to be used in seeking refund of tax because of the basic right possessed by the state as a sovereign to exact a fee for the privilege of operating motor vehicles within its territory in the absence of an express waiver of said right. In the context of state taxation, the appellees argued that any discussion of appellants' so-called "federal rights" must be limited to the determination of whether a remedy is available under state law and whether the appellants had properly utilized it.

For their part, the appellants continued to argue, as

they had in the prior *Ellsworth* case, that their basis for refund was an alleged violation of "federal rights" so that the state of Missouri could not qualify or condition recovery by local rules of practice including Chapter 136, RSMo 1978. In ruling in favor of the appellees, the Supreme Court of Missouri reiterated its findings in the prior *Ellsworth* case that the assertion of a "federal right" did not entitle the appellants to avoid the procedures set forth in § 136.035, RSMo 1978. Although recognizing that an assertion of federal rights could not be defeated under the name of local practice, the Supreme Court of Missouri again noted that the claims of the appellants were not defeated by the requirement that they be pursued through use of the remedy given by § 136.035, RSMo 1978. *State ex rel. Ellsworth Freight Lines, et al.* v. *State Tax Commission of Missouri,* Supreme Court of Missouri, Case No. 64266, decision issued on May 31, 1983 (Appendix B of Appellants' Statement of Jurisdiction, pp. 11-12).

II.

ARGUMENT

This case Presents no Substantial Question for Review of the Decision by this Court

In the statement of jurisdiction filed with this Court, appellants have again pointed out that the circuit court in Missouri found that certain practices used by the Missouri Highway Reciprocity Commission in computing the amount of highway registration fees due from the appellants as a result of their activity within this state violated rights contained in the United States Constitution. In view of this and because the appellants operate in interstate commerce, appellants claim that all local procedures and limitations for the recovery of such taxes as imposed by the state of Missouri must be cast aside. This is precisely the argument raised by appellants in an earlier case appealed to this Court, *Ellsworth Freight Lines, Inc., et al.* v. *Missouri Highway Reciprocity Commission, et al.*, 568 S.W.2d 521 (Mo. banc 1978) appeal dismissed and cert. den. 440 U.S. 901 (1979), in which this Court dismissed the appeal for want of jurisdiction and, treating the papers as a petition for writ of certiorari, denied certiorari. *See,* 440 U.S. 901 (1979).

The activities of the Missouri Highway Reciprocity Commission which led to this dispute are well documented. They were the subject of two lawsuits which culminated in the Missouri Supreme Court, *State ex rel. Brady Motorfrate, Inc., et al.*, v. *State Tax Commission,* 517 S.W.2d 133 (Mo. 1974), and *Ellsworth Freight Lines, Inc., et al.* v. *Missouri Highway Reciprocity Commission, et al., supra.* In *Brady, supra* at 135-136, the Missouri Supreme Court held that the unilateral breach of the Uniform Compact to

which both Iowa and Missouri were members by the state of Iowa by permitting the use of a method of calculation of highway registration fees known as the "compact mile" formula rather than the "total fleet" formula set forth in the compact did not authorize the state of Missouri to take similar action. Accordingly, recovery was allowed to the two named motor carriers, Brady Motorfrate and Bruce Motor Freight, on their claims for refund filed with the Missouri Director of Revenue under § 136.035, RSMo 1978. However, recovery was limited to the two years preceding application in accordance with the statute of limitations contained therein.

The prior *Ellsworth Freight Lines* case highlights the dispute even further because it deals with the first attempt by the appellants herein to obtain a refund of highway registration fees without exhausting the exclusive administrative remedies through direct action in circuit court. Although the appellants contended that they were entitled to sue directly in the trial court because the basis for refund was an alleged violation of "federal rights," the Missouri Supreme Court after reviewing the record determined that § 136.035, RSMo 1978, was the exclusive means of recovery and, accordingly, ordered the Circuit Court of Cole County to dismiss the petition filed by the plaintiffs. *Ellsworth Freight Lines, et al.* v. *Missouri Highway Reciprocity Commission, et al., supra* at 524-525.

In the current dispute as appealed to this Court by the appellants, the Missouri Director of Revenue conceded before the Missouri State Tax Commission that the application of the "compact mile" formula to highway reciprocity fees assessed against the appellants was improper, but maintained that class actions for refund of taxes collected illegally are not allowed in the state of Missouri, and that § 136.035, RSMo 1978, sets forth a two year statute of limitations. The Missouri State Tax Commission agreed

with the Director of Revenue's position and also held that the two year statute of limitations was not tolled by the purported filing of a class action. Furthermore, the State Tax Commission found no facts to show that the state induced delay of the filing of any refund claim.

This ruling by the Missouri State Tax Commission was affirmed by the Supreme Court of Missouri and, contrary to appellants' assertions, is a correct interpretation of the law. It has long been held that the police power of the state to regulate the use of motor vehicles on its highways extends to nonresidents as well as residents. *Kane* v. *New Jersey*, 242 U.S. 160, 167 (1916). Under its police power, a state may require a nonresident motor vehicle oyner to register and pay a reasonable registration for the privilege of operating his vehicle over the highways of this state. *See*, 60 C.J.S., Motor Vehicles, § 61, p. 408. In the absence of any federal legislation on this subject, the state of Missouri has the basic right of any sovereign to exact a fee for the privilege of operating within its territory, whether it be a motor vehicle or operating a business. The fact that this state determined to cooperate with other jurisdictions in setting the fees to be charged for the operation of motor vehicles in no way diminishes or waives state requirements concerning refund of those fees, absent further evidence that the state intended to do so.

Highway registration fees are taxes for the privilege of operating motor vehicles on the highways of this state. *Transport Rentals, Inc.*, v. *Carpenter*, 325 S.W.2d 745, 749 (Mo. 1959). It should be understood that the state of Missouri has not, by joining the Uniform Compact, thrust itself into the realm of interstate commerce or regulation of such *per se* but rather has attempted to tax activities within this state with the aid of a formula developed in conjunction with certain sister states. This Court has said that a state may use various methods in imposing a fee for the privilege

of using its roads as long as the fee is not excessive. It is the amount of the tax that is of central concern, not the particular formula involved. *See, Evansville-Vanderburgh A. A. Dist.* v. *Delta Air Lines, Inc.*, 405 U.S. 717 (1972). If it chose to do so, the state of Missouri could remove itself from this particular compact with its particular formula, or any other formula, and impose a flat fee on interstate carriers for the privilege of using the roads in this state. Having made full use of the Missouri highways during this period, the burden was on the appellants to demonstrate that the fee charged them exceeded fair compensation to the state for the privilege of using the highways. The record below does not demonstrate, nor could it, that the fees actually charged and paid by the appellants were excessive or burdensome to interstate commerce. At best, it demonstrates that the Missouri Highway Reciprocity Commission deviated from the formula agreed to among it and certain sister states, a formula contained within a compact to which the appellants were not a party.

The only question to be resolved is whether or not the state of Missouri can be compelled to forego the limitations found by the Missouri Supreme Court in § 136.035, RSMo 1978, because of the entry by the state of Missouri into this compact with several other states in which a uniform formula for determining the annual amount of highway registration fees was agreed upon, and then not used. Apparently, the appellants are convinced that the mere entry by the state of Missouri into the Uniform Compact coupled with the interstate nature of the appellants' business is sufficient to endow the appellants with certain "federal rights" of such a character that the state of Missouri is powerless to assert any exclusive statutory remedies or procedures governing the refund of taxes paid for activities conducted herein. This is not true. The actions of this state in no way diminish or waive state requirements re-

specting refund of taxes in the event they are collected improperly, absent further evidence that the state intended to do so. This Court has said distinctly that waiver of sovereign immunity will be found only where stated by "the most express language or by such overwhelming implications from the text as would leave no room for any other reasonable construction." *Murray* v. *Wilson Distilling Company*, 213 U.S. 151, 171 (1909).

Appellants attempt to distinguish by citing several cases which deal with the question of waiver of sovereign immunity by a state with respect to the Eleventh Amendment to the United States Constitution. Based on this, appellants proclaim that the governing law of this action is federal law and that all Missouri laws adversely affecting their position must be considered waived in view of an overwhelming "federal right." However, a review of the two principal cases, *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), and *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), reveals that the cases do not support the proposition for which cited.

The *Petty* case involved a suit in federal court under the provisions of the Jones Act against the Tennessee-Missouri Bridge Commission, a commission organized pursuant to a compact between the states of Tennessee and Missouri which had been specifically approved by the United States Congress pursuant to the compact provision of the United States Constitution. The bridge commission raised the question of immunity from suit pursuant to the Eleventh Amendment, which forbids suits by individuals against the state in federal courts. The critical question according to this Court is whether or not the state had intended by its action to waive traditional concepts of sovereign immunity. *Petty* v. *Tennessee-Missouri Bridge Commission*, *supra* at 278. This Court found that the state

had clearly waived any claim of sovereign immunity by accepting the compact agree because the agreement itself specifically provided for a right to sue and be sued in language formally adopted by Congress. *See, Petty* v. *Tenneesee-Missouri Bridge Commission*, supra at 280.

The *Parden* case involved a suit in federal court against the state of Alabama under the Federal Employers Liability Act. The damages involved were suffered on the job while employed by a railroad operated by the state of Alabama. In determining that the defense of sovereign immunity was not available, this court held that the state of Alabama had affirmatively waived such a defense with respect to operations under the Federal Employers Liability Act by engaging in the business of operating a railroad. In other words, the waiver stemmed from the state's commission of an act to which Congress, in the exercise of its constitutional power to regulate commerce, had attached the condition of amenability to suit. Perhaps the best description of the impact of the *Petty* and *Parden* cases is contained in the language of this Court in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), in which the following comment was made:

> Parden . . . involved a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included states or state instrumentalities. Similarly, Petty v. Tennessee-Missouri Bridge Comm'n., supra, involved congressional approval, pursuant to the Compact Clause of a compact between Tennessee and Missouri which provided that each compacting state would have the power "to contract, to sue, and be sued in its own name." The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the state by its

participation in the program authorized by Congress had in effect consented to the abrogation of that immunity. *Id.* at 671-72.

The question has never been one of federal law versus state law, as asserted by the appellants, but rather whether or not the state of Missouri has waived any of its statutory rights with respect to the exclusive procedures to be used in seeking refunds of taxes by its entry into an interstate compact with certain of its sister states for the purpose of registering motor vehicles. In determining whether or not such a waiver can be found, the following facts are of importance: the Highway Reciprocity Commission was created by the Missouri legislature in §§ 301.271 through 301.279, RSMo 1978. Those sections give the Commission its specific authority to enter into direct reciprocal agreements or arrangements with other states, the District of Columbia, territories of the United States, and foreign countries under the terms and conditions set forth in § 301.277, RSMo 1978. These sections do not give the Commission the power to sue or be sued, nor do they give the Commission the power to abrogate other state statutes dealing with the refund of taxes. All fees collected for the registration of motor vehicles in this state are deposited with the State Treasury to the credit of the State Highway Department Fund pursuant to § 301.090, RSMo 1978. Art. IV, § 30 of the Missouri Constitution provides that such highway funds stand appropriated without the consent of the legislature for road building purposes and no other.

The grant of authority to the Missouri Highway Reciprocity Commission by the Missouri legislature was a limited grant of authority dealing only with negotiation and entry into various compacts for the purpose of establishing a fair and equitable means of taxing motor vehicles engaged in interstate commerce in this state. There is no showing that the Commission was ever authorized to

abrogate traditional Missouri law with respect to the claiming of a refund for taxes collected illegally. The only evidence that appellants produced to show that the state had waived any of its procedural requirements concerning refund of taxes is the mere entry into the Uniform Compact by the state of Missouri. This hardy constitutes a waiver through express language or by overwhelming implication.

When referring to the compact which forms the basis for appellants' claims for relief, it is necessary to keep in mind that proper principles of construction require that the limits established by statute on the ability to enter into a contract be given primary emphasis in determining the rights and liabilities under the terms of such compact. *Steel Haulers, Inc.*, v. *United States*, 316 F.Supp. 707 (W.D. Mo. 1970), aff'd, 440 F.2d 1176 (8th Cir. 1971). In reviewing the terms and conditions of the Compact itself, it is readily apparent that no provisions are dedicated to the question of refunds of highway registration fees. In fact, Art. III, § 34 of the Compact specifically indicates that the Compact is meant to change only those laws in each state pertaining to registration fees and then only to the extent provided. Indeed, it would have been outside the scope of the authority granted to the Missouri Highway Reciprocity Commission to have negotiated and entered into a compact which did provide methods and procedures for refunds deviating from the standards established by statute.

Appellants have been trumpeting their "federal rights" since these disputes began. In so doing, they ignore the fact that relief was available under Missouri law and was successfully used by other motor carriers. *See, State ex rel. Brady Motorfrate*, Inc., 517 S.W.2d 133 (Mo. 1974). Furthermore, no taxpayer would be powerless to prevent improper tax collection through appropriate legal action to enjoin further unlawful conduct. However, appellants themselves admitted in the prior lawsuit filed di-

rectly against the state of Missouri in the Circuit Court of Cole County (*see, Ellsworth Freight Lines, Inc., et al.* v. *Missouri Highway Reciprocity Commission,* 568 S.W.2d 521 (Mo. banc 1978), appeal dismissed and cert. den. 440 U.S. 901 (1979), that injunction was no longer necessary because Missouri had ceased applying the formula complained of in some instances and obtained an amendment to the Uniform Compact which authorized a different formula in others.

This Court has long recognized the important and sensitive nature of state tax systems and the need for restraint when deciding cases that affect such systems. *See, Dows* v. *City of Chicago,* 11 Wall. 108, 110, 20 L.Ed. 65 (1871). Invoking principles of comity, this Court has refused to determine the constitutional validity of a state tax where a remedy was available under state law and the taxpayer had not utilized it. *First National Bank of Greeley* v. *Board of County Commissioners of the County of Weld,* 264 U.S. 450, 453-54 (1924). State procedures for obtaining tax refunds should not be ignored or evaded where state means for protection of rights are available because of the overriding need of the state to protect its tax base.

Missouri law provides the means for complete relief from the violations alleged by the appellants. Injunctive remedies were available to prevent the collection of the taxes computed incorrectly at any time before they were paid. Furthermore, every taxpayer who was overcharged had the right under § 136.035, RSMo 1978, to challenge the assessment and seek a refund. Appellants here are not complaining about the lack of a remedy, they are complaining about the limitation on the amount of their recovery. This in no way affects the nature of the remedy available, but only highlights the unfamiliarity of the appellants with the nature of the remedy available. The concept of "federal rights" cannot be expanded to include the right to a class

action or the right to ignore applicable statutes of limitation under any theory presented by the appellants. The state of Missouri, like any sovereign, has the right to protect its tax base by insisting that suits for refund of taxes meet certain minimal standards. No one can complain about those standards as long as the right to challenge the constitutionality or propriety of the underlying tax has been fully preserved. The named appellants herein deliberately chose the time for commencement of proceedings in this state. The other members of the class supposedly represented by the named appellants chose not to utilize the Missouri procedures available and thereby lost their right to challenge past practices. This right should not be reconstructed on the basis of the record before the Missouri Supreme Court.

III.

CONCLUSION

Wherefore, appellees respectfully submit that the question upon which this cause depends is so unsubstantial as not to need further argument, and appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Missouri.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

WILLIAM F. ARNET
Assistant Attorney General

Broadway State Office Building
221 West High Street, 8th Floor
Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-8814

Attorneys for Appellees

RICHARD L. WIELER
Assistant Attorney General
Of Counsel

December 30, 1983